Funk Manufacturing Company *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America—UAW. Case 17–CA–14894

January 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On September 19, 1990, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified.[2]

1. The judge found that the Respondent's no solicitation-distribution rule as set forth in the employee handbook was unlawful on its face. We disagree. The no solicitation-distribution rule reads as follows:

> Solicitation and/or distribution of literature by non-employees on Company property is prohibited.
>
> Solicitation by employees on Company property during working time is prohibited. Working time is the time an employee is expected to be performing their [sic] job duties and does not include break periods or mealtimes.
>
> Distribution of literature by employees on Company property in non working areas during working time as defined [in preceding paragraph], is prohibited.
>
> Distribution of literature by employees on Company property in working areas is prohibited.

In finding the no solicitation-distribution rule facially invalid, as overly broad, the judge focused on the use of the term ''on Company property'' in the second, third, and fourth paragraphs of the rule. While conceding that the presence of the term ''during working time'' in the second paragraph might validate that restriction on solicitation (the judge inadvertently mischaracterized the second paragraph as a restriction on distribution), the judge found that in any event the use of the term ''on Company property'' in the third and fourth paragraphs was ''clearly too broad,'' in that it would prohibit distribution in nonworking areas and in working areas at times when no work is required to be performed.

We disagree with the judge's reading of the rule. We find that the inclusion of the terms ''during working time'' in the second and third paragraphs, and ''in working areas'' in the fourth paragraph of the rule makes it facially valid, and not overly broad. Thus, in the second paragraph, the prohibition against solicitation ''on Company property'' is expressly—and validly—limited to ''during working time.'' The rule neither expressly nor implicitly prohibits solicitation on company property during *nonworking* time. Similarly, in the third paragraph, the prohibition against distribution in nonworking areas is expressly limited to ''during working time.'' No prohibition against distribution in nonworking areas during *nonworking* time is expressed or implied. Finally, in the fourth paragraph, the prohibition against distribution ''on Company property'' is expressly—and validly—limited to ''in working areas.'' Thus, we find, contrary to the judge, that the Respondent's no-solicitation-distribution rule is not facially invalid, as overly broad, and we shall dismiss this allegation.[3]

2. We agree with the judge that the Respondent unlawfully disciplined employees Mark Layton and Robert Bolden. As described more fully by the judge, the Respondent has a formal system of progressive discipline involving warnings, in which step 1 is an oral ''casual reminder,'' step 2 is an ''oral reminder,'' and step 3 is a ''written reminder.'' Although the step 1 and 2 warnings are not per se written warnings, the Respondent's plan calls for them to be recorded in the individual's personnel file.

On February 28, 1990, Layton distributed union literature in a nonwork area (the entrance to the building)

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the third from the last paragraph of sec. IV of his decision, the judge found that the Respondent's disciplining of employees Robert Bolden and Mark Layton violated Sec. 8(a)(3) of the Act. We agree. However, in his formal Conclusion of Law 7 and in par. 1(g) of his recommended Order, the judge inadvertently failed to include language descriptive of the nature of the violation as to Bolden. We have modified par. 1(g) of the recommended Order to include such language. We have also modified par. 1(b) of the judge's recommended Order by deleting the word ''solely,'' to eliminate any suggestion that the Respondent could lawfully enforce plant rules in a manner designed only *in part* to prohibit employees from engaging in protected concerted activity. Finally, we have modified par. 1(a) of the judge's recommended Order to reflect our dismissal of the allegation that the Respondent maintained an invalid no solicitation-distribution rule, as discussed infra.

[3] Rules prohibiting solicitation and distribution during working time are presumptively valid. See *Our Way, Inc.*, 268 NLRB 394 (1983); *Essex International*, 211 NLRB 749 (1974). See also *NLRB v. United Steelworkers of America (Nutone)*, 357 U.S. 357 (1958).

The judge's reliance on *United States Steel*, 223 NLRB 1246 (1976), for finding a violation under the instant circumstances, is misplaced. In that case, the rule in question was found to be overly broad because (unlike the rule in the instant case) it prohibited distribution *anywhere* on plant property, during both working *and* nonworking time, thus effectively—and impermissibly—prohibiting distribution in *nonwork* areas during *nonwork* time.

The facial validity of the Respondent's off-duty employee rule as set forth in the employee handbook is not before us.

on nonwork time. The Respondent's director of human resources, Steve Waage, told Layton to stop and that if he distributed literature again, he would be ''in severe violation'' and ''subject to disciplinary action.'' According to Waage, ''I advised him that further violation of the solicitation distribution rule would place [him] in a circumstance where he could be further disciplined.'' However, when asked whether his remarks to Layton were actually a step 2 ''oral reminder,'' Waage testified that *his* interpretation of his conversation with Layton was that it was only a ''casual reminder.'' Waage elaborated:

> By virtue of the disciplinary process that we have, unless it's for a severe incident, you're going to start with that casual reminder. . . . Had I come across that incident again, my next step would have been an oral reprimand and something for the file, absolutely.

Thus, we find that by any reasonable standard of analysis, the judge correctly found that Waage gave Layton a warning—here, a step 1 ''casual reminder'' within the Respondent's formal disciplinary plan—for distributing union literature in a nonwork area during nonwork time.[4]

We also agree with the judge that the Respondent twice disparately enforced its off-duty employee rule against employee Robert Bolden, and discriminatorily gave him a disciplinary admonishment on the second occasion.

Bolden was one of the first employees to become active in the Union's organizational campaign. According to Bolden, ''every night periodically'' during December 1989 and January 1990 he set out union literature on tables for perusal by other employees during their work breaks. He also gave out union literature to employees who asked him for it (but he asked that they return it to him when they were finished with it). Additionally, in early January he spoke with an estimated 15 to 20 employees about the Union, before and after his shift and during breaktimes. By late January, Bolden had also begun to wear a union (UAW) cap to work.

On January 12, 1990, Bolden was admonished by his shift foreman for briefly bantering with another employee, John Martin, for a few seconds about the latter's supposed distribution of union authorization cards. At the time of this episode, Martin was on his work time, and Bolden had not yet begun his work shift. Bolden was not wearing his UAW cap. Later, during Bolden's work shift, Shift Superintendent Gene Palmer told Bolden that from then on when he came to work early he was not to stop and speak with anyone, that there was a rule that prohibited talking to employees on other shifts (presumably, a reference to the Respondent's off-duty employee rule). Bolden questioned Palmer about why this rule was being applied only to him, asserting that he was only doing what others did. Palmer did not give Bolden any further explanation.

About 2 weeks later, when his work shift ended, Bolden, wearing his UAW cap, approached fellow employee Bill Jenkins, who was still on his work shift. As Bolden began to speak to Jenkins, Shift Superintendent Gene White interceded, and told Bolden that Jenkins was busy and could not speak with him until Jenkins' shift was over. Bolden complained to White that he was being treated differently from other employees. White denied that he was.

The next day, Director of Human Resources Steve Waage told Bolden that he had heard that Bolden had been on the verge of being insubordinate to White the night before. Waage told Bolden that he wanted Bolden to leave the plant at the end of his work shift, without stopping to converse with other employees. As the conversation ended, Waage told Bolden that he ''liked'' Bolden's UAW cap. Bolden asked Waage what he meant, and Waage replied that his remark was a ''joke.''

We agree with the judge that regardless of whether the Respondent intended its above statements to Bolden to constitute either ''casual'' or ''oral reminders'' within the Respondent's formal system of progressive disciplinary warnings, the Respondent's admonishments to Bolden were motivated by his union activity, and Bolden had good reason, under the circumstances, to perceive these admonishments in that coercive and discriminatory light. Bolden manifested his support for the Union by regularly setting out union literature for review by other employees, by discussing the Union with numerous other employees during his nonwork time, and by wearing a UAW cap. We also note the union-related subject matter of Bolden's brief bantering with Martin. The record establishes the Respondent's knowledge of union activity in the plant around the same time that Bolden was first admonished for violating the Respondent's off-duty employee rule. Thus, shortly after that mid-January incident, employee Earl Grove was unlawfully interrogated about his union sympathies by Production Manager Max Williams. And, as seen, Waage made direct reference to Bolden's union activity by his ''joking'' reference to Bolden's UAW cap at the conclusion of his admonitory conversation with Bolden in late January or early February. Moreover, we agree with the judge's assessment, in the introductory paragraph of section III,C ''Application of the Rules,'' of his decision as well as in the fourth paragraph of section IV, that the Respondent's off-duty employee rule is not routinely en-

[4] Apparently, there was no written record of this warning placed in Layton's personnel record; Waage testified, ''I don't put anything in the file for the casual reminder.''

forced. Particularly in light of the timing of the enforcement of this rule against open and active union supporter Bolden, and in light of the evidence that this rule is not routinely enforced, we agree with the judge that the Respondent discriminatorily enforced this rule against Bolden, in violation of Section 8(a)(1) and (3) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Funk Manufacturing Company, Coffeyville, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Prohibiting employees from distributing union literature at times and places that would not interfere with work production.''

2. Substitute the following for paragraph 1(b).

''(b) Enforcing plant rules in a manner designed to prohibit employees from engaging in protected union activity.''

3. Substitute the following for paragraph 1(g).

''(g) Disciplining its employees with respect to their hire and tenure for lawfully passing out union handbills and engaging in other protected concerted activity.''

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit employees from distributing union literature at times and places that would not interfere with work production.

WE WILL NOT enforce plant rules in a manner designed to prohibit employees from engaging in protected union activity.

WE WILL NOT interrogate our employees regarding their union sentiments and desires.

WE WILL NOT threaten our employees with loss of their jobs in the event of unionization.

WE WILL NOT confiscate union literature in the possession of our employees.

WE WILL NOT prohibit or interfere with our employees who are lawfully engaged in passing out handbills pertaining to the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America—UAW or any other union.

WE WILL NOT discipline our employees with respect to their hire and tenure for lawfully passing out union handbills or engaging in other protected concerted activity.

WE WILL NOT in any like or related manner restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL remove from our files any reference to the discipline of Mark Layton and Robert Bolden and notify them in writing that this has been done and that the discipline will not be used against them in any way.

FUNK MANUFACTURING COMPANY

Constance N. Traylor, Esq., for the General Counsel.
Paul J. Schroeder Jr. (Bryan, Cave, McPheeters & McRoberts), of St. Louis, Missouri, for the Respondent.
Archie R. Buttram, International Representative, UAW, of Kansas City, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Coffeyville, Kansas, on June 12, 1990, on a complaint issued by the Acting Regional Director for Region 17 of the National Labor Relations Board on April 20, 1990. The complaint is based on a charge filed by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America—UAW (the Union or the UAW) on March 6, 1990, amended on April 17, 1990. It alleges that Funk Manufacturing Company (the Respondent) has committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act.

Issues

This case principally involves allegations by the General Counsel that Respondent has engaged in a series of unfair labor practices designed to nip a nascent union organizing drive in the bud. Specifically, the complaint alleges that Respondent has unlawfully interrogated and threatened employees because they were engaged in union activity, has confiscated their union literature, has interfered with the lawful distribution of handbills, and has unlawfully implemented or enforced certain plant rules in order to prevent employees from discussing the benefits of unionization.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Both the General Counsel and Respondent have filed briefs which have been carefully considered. Based on the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Kansas corporation, manufactures and distributes transmissions for heavy equipment and trucks at its facility in Coffeyville, Kansas, where it annually ships and receives goods valued in excess of $50,000 to and from points outside Kansas. Respondent therefore admits and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent also admits the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is one of the largest, if not the largest, employer in (actually about 2 miles outside) Coffeyville, a small town located in southeast Kansas. It employs about 350 people. The plant operates round the clock on a three-shift basis, although the third, the graveyard shift, does not appear to be as large as the other two. The plant itself is quite large, located in the open country. The acreage, including the parking lot, is surrounded by a chain link fence, having at least one and probably more, access gates. Until 1989 it was a subsidiary of Cooper Industries. Sometime during that year, the record is not clear exactly when, the operation was sold to the John Deere Company. As a Cooper subsidiary, Respondent's employees were not represented by any labor union. However, the Charging Party does represent Deere employees at other locations.

Sometime in early December 1989, Archie Buttram, one of the Union's International organizers, received a telephone call from one of Respondent's employees, Robert Bolden. On December 18, another employee, Mark Layton, became involved. Both were given literature to distribute. Both also signed authorization cards. Buttram met with them on numerous occasions and in mid-January 1990 the UAW rented an office about 3-1/2 miles from the plant, manning it 2 days a week. Layton has keys to the office and is often the individual who is present when the office is open.

Bolden and Layton, together with two other employees, Earl Grove and Roy Thompson, are the individuals who are the subjects of the General Counsel's complaint.

B. *The Company Rules*

Although owned by John Deere, Respondent during the period in question, January and February 1990, continued to operate under the plant rules as promulgated by Cooper. These are set forth in detail in the employee handbook. (Jt. Exh. 1.) The rules challenged by the complaint are those dealing with the right of off-duty employees to be present at the plant and the no-solicitation, no-distribution rule. Connected to them are additional regulations which set forth the appropriate punishment for their breach.

The off-duty employee rule, which is questioned as discriminatorily enforced, reads as follows:

> Except for a reasonable period of time (15 minutes) before and after work, employees should not enter or remain in any designated work area. Employees scheduled for work who arrive earlier or stay later than 15 minutes, must remain in designated break areas. Your cooperation in this matter is important in preventing unnecessary accidents and interruptions of scheduled work.
>
> Permission to enter the plant on an off-shift, to pick up personal items left behind or to work on special projects previously approved, must be obtained from the management person in charge of work shift or the Employee Relations Department.

The no-solicitation, no-distribution rule is under attack both as being unlawful on its face and as being discriminatorily applied. It reads as follows:

> Solicitation and/or distribution of literature by non-employees on Company property is prohibited.
>
> Solicitation by employees on Company property during working time is prohibited. Working time is the time an employee is expected to be performing their [sic] job duties and does not include break periods or mealtimes.
>
> Distribution of literature by employees on Company property in non working areas during working time as defined [in preceding paragraph], is prohibited.
>
> Distribution of literature by employees on Company property in working areas is prohibited.

To implement the rules set forth in the handbook, the book contains what appears to be a system of progressive discipline, known as the Cooperative Improvement Plan. As imposed, the plan begins with a ''casual reminder,'' which is nonetheless recorded and is the first step toward more serious consequences. The book says that a casual reminder is ''between the employee and the supervisor. Its primary purpose is to identify the problem and outline a means for corrective action.'' Normally, of course, that would appear quite benign, but as will be seen, when it comes to an employee distinguishing between a ''casual reminder'' and a routine rebuke not having disciplinary consequences, the difference is difficult to perceive.[1]

In addition, the handbook, on page 4, contains a three-paragraph policy statement explaining that Respondent is nonunion and believes that it is preferable not to deal with an ''outside party'' such as a union. While that statement is not alleged to be unlawful or evidence of union animus, it nonetheless serves as a guide to understand management's policy insofar as its ready acceptance of unionization is concerned.

[1] Subsequent steps in the cooperative improvement plan are: ''oral reminder,'' ''written reminder,'' and ''decision making leave.'' Each of these steps, including the first, ''casual reminder,'' is recorded in the employee's personnel file.

C. *Application of the Rules*

Before describing the incidents in detail, it should be observed that there is a great deal of evidence that the rules in question are not enforced. Many witnesses testified that outside agencies commonly solicit within the plant. There are Girl Scout cookie sales; a local church solicits orders for homemade dinners to be brought into the plant; and raffle tickets are sold. Moreover, private entrepreneurship has been condoned, including cosmetic products, jewelry, vegetable seedlings, and fresh produce. And, for years, Respondent has permitted employee solicitation for a paycheck pool, a form of gambling. All of these involve at least a minimum of interference with work. Finally, although there are designated break areas containing tables and vending machines within the plant, people often take breaks elsewhere, including socializing at the machines. There is one group of employees known as the ''Breakfast Club'' which takes breaks at other than authorized times, clearly ''interfering'' with each other's work. This entire scenario suggests that productivity is not really affected by these sorts of interruptions, that Respondent knows it, and is not concerned.

1. Robert Bolden

Bolden is a lathe operator having been employed for about 1-1/2 years. He was one of the very first to be interested in representation by the UAW. Buttram gave him several types of union literature which he took to work. During December and January, he placed the literature on tables for perusal by fellow employees during breaks and spoke about the Union to an estimated 15–20 employees.

On January 12, 1990,[2] Bolden came to work about 10:20 p.m. Although this was 40 minutes prior to the commencement of his 11 p.m. shift, it was not unusual for him to arrive so early. Indeed, uncontroverted evidence demonstrates that many other employees often did so, too. On this occasion, as he passed the inspection (quality control) office, he briefly bantered with Inspector John Martin joking that he had heard Martin was passing out union authorization cards. According to him, the incident only took seconds, but instantly Second-Shift Foreman Ron Ray appeared behind him saying, ''[W]hen you come in, go straight to your department. Don't stop and talk to any of my people.'' Ray does not disagree, saying he was enforcing Respondent's policy requiring early arrivers to go to a break area until their tie-in time.[3]

Later that night, about 2:30 a.m., Bolden was called to the plant superintendent's office by Third-Shift Superintendent Gene Palmer. After first discussing some errors Bolden had supposedly made, Palmer told him, ''[F]rom now on when you come to the plant, don't stop and talk to nobody. And, as a matter of fact, you don't have to come in that early . . . there is a rule that says you can't talk to any of the people . . . the other shifts . . . if you come in early, you go to the designated break area, but [if] you['re] going to talk to the guy on your machine, that's all right, but other than that don't talk to nobody.'' Bolden questioned why the rule was being applied to him, asserting he was only doing what others did and that it was a common practice. He thought he was being ''picked on.'' He said Palmer would not explain further.

Palmer testified he had this conversation because he had observed Bolden talking to a grinder named Don Martin about 10:20 p.m. He contends Bolden was interfering with Don Martin's productivity. He did not testify that he so told Bolden, saying only that he told Bolden to stop bothering other employees when he came to work.

About 2 weeks later, a similar incident occurred. On this occasion, Bolden had come to work wearing a UAW baseball cap. When his shift ended, he walked to a nearby area to speak with his friend and fellow employee Bill Jenkins. He observed First-Shift Superintendent Gene White following him. As he started to speak to Jenkins, White interceded, saying Jenkins was ''busy now, he can't talk to you. If you want to talk to him, he gets off at 3 o'clock.'' White objected that he wasn't being treated the same as others, that he could at that very moment observe other off-duty employees conversing with on-duty employees.[4]

The next day, Steve Waage, Respondent's director of human resources, motivated by the incident between Bolden and White (and not apparently by the previous incident involving Ray and Palmer), told Bolden that he understood Bolden had, the night before, been on the verge of becoming insubordinate. Waage repeated that he wanted Bolden to leave the plant at the end of his shift. Although their conversation was civil, Waage did say the conversation constituted a ''verbal warning.'' As they broke off, Waage remarked that he ''liked'' Bolden's UAW cap.

2. Mark Layton

In the early morning of February 28, Layton, together with several union officials, were passing handbills to employees at the main fence gate. At the suggestion of one of the officials, Layton, who was then off duty, determined to hand out his handbills next to the door of the building. Accordingly, he left the gate and walked across the property to the building entrance. There he began passing handbills to arriving employees. About 7:10 a.m., Waage and Production Manager Max Williams came outside through that same door. Waage said to Layton, ''Mark, I would advise you not to pass out literature on company property. We have a no solicitation rule here . . . . We don't let anybody pass out literature here; we won't let you pass out literature here. If you do it again, you'll be in severe violation.'' Waage also observed that Layton was not scheduled to be at the plant until his afternoon shift began.

Waage's recollection of the incident is nearly identical, specifically saying that Layton's conduct had triggered the progressive discipline system. He explained that Respondent has always interpreted the no-solicitation rule to prohibit handbilling anywhere within the fenced area of the facility. Respondent has not suggested that Layton was interfering with ingress or egress or was engaging in any disruptive activity.

[2] All further dates are 1990 unless otherwise indicated.

[3] The tie-in time is the 15-minute period before actually beginning work. It is usually used by counterpart employees to explain to the next shift the status of the work on the machine.

[4] Both Bolden and Jenkins are black. Bolden asserts that there are few black employees at the plant and that most of the whites are not receptive to him. He says he has few opportunities to socialize with fellow black employees. For that reason he was sensitive to White's intervention.

C. *Roy Thompson*

Roy Thompson operates a deburr machine on the graveyard shift. He has worked for Respondent for 16 years. He testified that sometime in mid-February he was given a UAW authorization card, a mailing envelope, and some other literature. He placed the literature partially under his personal toolbox and the card and mailer on top. The box itself has, for many years, been stored on a company dolly. The dolly is located across a hallway some distance to the rear as he operates his machine.

The material had been sitting in that fashion for about a week when early one morning, Shift Superintendent Gene Palmer asked Thompson about it. Thompson said about 2:30 a.m. Palmer approached him with the material in his hand, asking if it belonged to him. Thompson said it did, whereupon Palmer asked if he wanted it. Thompson responded that the material ''wasn't bothering him and wasn't bothering no one else.'' Thompson recalled that Palmer then said he ''liked''[5] Thompson's work, that Thompson was good with new employees, and that he would hate to see something happen to Thompson's job. He went on to explain that he had had a bad experience with a union at a firm known as Lee's Manufacturing located in Cherryville. Subsequently, Palmer threw Thompson's material away.

At one point, Palmer asserted that Thompson had given him permission to throw the material away, so he did so. He observed that he knew Thompson was unable to read, so he couldn't see much likelihood that Thompson wanted to keep the material around. He also said he had found it next to a discarded soda can and potato chip bag so he thought it, too, might be trash. Yet, he agrees that Thompson said the material wasn't bothering anybody. I fail to see where that statement was Thompson's permission to throw the material away. Instead, it suggests that Thompson was mildly asking Palmer to leave the material alone.[6] Accordingly, Palmer's testimony on the point is rejected. In addition, Palmer denied referring to Thompson's job or to his union experience at Lee's. Based on Palmer's equivocation with respect to Thompson's union literature and his confiscation of it, I reject his denial that he made no threat regarding Thompson's job.

D. *Earl Grove*

Earl Grove works in the flexible machine center (where three people share five machines). He has worked on two occasions for Respondent totalling 7-1/2 years. He testified that on January 23 Production Manager Max Williams came to his work area to talk. Williams began the conversation by asking Grove if he had discussed a recent pay raise with his supervisor. After a brief discussion over Grove's job description, Williams asked why the second shift needed a ''f—ing'' union. Grove did not answer directly, but told Williams he should ask everyone, because they all had different reasons. Williams then went on to say the ''f—ing union would not do any good for Funk or anybody.'' He asserted that a union would render Respondent uncompetitive and it would go broke. Grove recalls Williams saying he had seen both sides of the union issue and that unions had not done any good.

Williams denies mentioning the union during the conversation. Yet his recollection was not good and he was, as the General Counsel observes, somewhat evasive. Certainly Grove's demeanor evinced more believability. Williams' denial is not credited.

IV. ANALYSIS AND CONCLUSIONS

In reviewing the factual material as described and found above, I am compelled to conclude that the General Counsel has prevailed in each instance. The facts are either not in significant dispute or are easily resolved in favor of the General Counsel. Moreover, as seen below, the law supports the conclusion that each of the allegations proven constitute unfair labor practices.

Taking the no-distribution rule first, it is quite clear that its second, third, and fourth paragraphs are unlawful on their face. In each instance the paragraph prohibits distribution of union literature ''on Company property.'' It is true that there is an effort in the second paragraph to limit distribution to ''working time'' and, taken alone, that might withstand 8(a)(1) scrutiny. However, the use of ''company property'' in the remainder of the paragraphs is clearly too broad. It prohibits distribution in nonworking areas and in working areas at times when no work is required to be performed. In some respects the paragraph is self-contradictory. That sort of inconsistency creates an ambiguity in application which is not easy to resolve on the floor. It can be interpreted to bar the distribution of protected material at times and places when there would be no interference with work, particularly where the entire paragraph is governed by a ''company property'' syndrome.

Moreover, the ''company property'' language itself is excessively restrictive in the context of this Respondent's physical layout.[7] As Waage testified that Respondent has always considered the rule to be applicable to the property outside the building, and as he enforced that understanding against Layton on February 28, it is clear that the rule is not intended to permit any in-plant distribution, much less outside distribution. Respondent uses the ''company property'' catchall language to justify barring distribution anywhere within the perimeter fence. Thus, the no-distribution rule as written is unlawful. *Tri-County Medical Center*, 222 NLRB 1089 (1976).

In addition, its enforcement, as well as the enforcement of the off-duty employee rule is discriminatory. It is quite clear from the evidence that many things are allowed to temporarily disrupt work and it is also quite clear that off-duty employees are commonly found in the plant at locations other than designated break areas. Only when Bolden and Layton began using those privileges to distribute union material or talk about unionization did management use those rules as justifications for interdicting the conduct. In no case has Re-

[5] The transcript at Tr. 75:22 mistranscribes the word ''liked'' as ''elected.'' The error is corrected. Respondent's argument that Thompson's testimony is unintelligible relies on that transcription error.

[6] While Thompson is unable to read, one should not conclude that he is ignorant. He testified that the reason he was retaining the material was to allow sufficient time to pass to see if Deere would operate the Company any differently than Cooper had. Depending on his assessment of the situation, he intended to either sign the authorization card or reject it. Palmer appears to have sensed Thompson's uncertainty and realized that there was some possibility that Thompson might sign the card. Because Respondent's handbook states that it is a nonunion company which prefers to stay that way, it was a simple step to enforce that policy by removing the card from Thompson's temptation.

[7] *U. S. Steel Corp.*, 223 NLRB 1246 (1976).

spondent shown that Bolden actually interfered with anyone's work. His speaking with John Martin and Jenkins, at least in terms of time, took only seconds. In fact his conversation with Jenkins does not even appear to have occurred, for White stopped it before it started. Clearly Bolden had been identified as a union sympathizer, if for no other reason than his UAW cap or his willingness to engage in union banter with John Martin. The evidence seems clear to me that these rules were being applied to Bolden and Layton only because of the nature of the subject matter they were likely to be engaged in, union-related topics. Accordingly, I find that Respondent violated Section 8(a)(1) in the way it chose to invoke these two rules to inhibit the employees' protected conduct of distributing union material or talking to employees about unionization at times when their work would not be adversely affected.

In addition, I find that in both instances Respondent invoked the first step of the progressive disciplinary system, or it reasonably appears to have done so. Certainly, with respect to Layton, Waage admitted that he had. Insofar as Bolden is concerned, Respondent argues that the system had not been invoked for no record was kept of either White's, Palmer's, or Waage's admonitions to him. Yet, how can one really know that? It seems to me that each of these conversations, by tone alone, constituted more than the minimum so-called casual reminder. They may have even appeared to be the next step, the ''oral reminder.'' Certainly Respondent did not tell Bolden that they were admonitions less than disciplinary, and he could not help but conclude otherwise.

The complaint alleges that the invocation of the disciplinary system violates Section 8(a)(3) as well as 8(a)(1) as it affects the ''hire and tenure'' of an employee within the meaning of that section. I agree. An 8(a)(3) violation occurs where hire and tenure is affected as a result of discipline for protected conduct, even if the discipline is less than a suspension or discharge. Here, it reasonably appears that Bolden was being subjected to the progressive discipline system and Layton was admittedly so subjected. Accordingly, the conduct violated Section 8(a)(3).

Palmer's treatment of Thompson in the wee hours of a February morning violated Section 8(a)(1) in two separate ways. First, Palmer had no permission to discard Thompson's union literature and authorization card. Second, it is clear to me that he took advantage of the situation to utter a not-so-subtle threat to Thompson that pursuit of the Union might somehow result in Thompson losing his job. Moreover, the conversation necessarily attempted to force Thompson to reveal his union sentiments and desires. Although not couched in questioning terms, it was, nonetheless, an interrogation. This was not idle chatter.

Finally, there is Williams' conversation with Grove. In it, Grove asserts that Williams interrogated him, simultaneously disparaging the Union, about why Grove's shift wanted union representation. Williams' denial has previously been discredited and it is clear that the interrogation was anything but innocent. Its tenor suggests that Williams might well have been intending to use the interrogation in an intimidatory manner. He may well have wanted to know why the employees wanted a union, but his tone suggests that he also wanted Grove to know that he strongly disapproved, hoping to convince Grove that unionization was unacceptable to him. As a coercive interrogation it violates Section 8(a)(1).

CONCLUSIONS OF LAW

1. By maintaining and enforcing rules prohibiting employees from distributing union literature at times and places which would not interfere with work production, Respondent has violated Section 8(a)(1) of the Act.

2. By enforcing plant rules in a manner designed solely to prohibit employees from engaging in protected union activity, Respondent has violated Section 8(a)(1) of the Act.

3. By interrogating its employees regarding their union sentiments and desires, Respondent violated Section 8(a)(1) of the Act.

4. By threatening its employees with loss of their jobs in the event of unionization, Respondent violated Section 8(a)(1) of the Act.

5. By confiscating the union literature of its employees, Respondent violated Section 8(a)(1) of the Act.

6. By prohibiting and interfering with its employees who were lawfully engaged in passing out handbills pertaining to the Union, Respondent violated Section 8(a)(1) of the Act.

7. By disciplining employees with respect to their hire and tenure for lawfully passing out handbills pertaining to the Union, Respondent violated Section 8(a)(1) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Funk Manufacturing Company, Coffeyville, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing rules prohibiting employees from distributing union literature at times and places which would not interfere with work production.

(b) Enforcing plant rules in a manner designed solely to prohibit employees from engaging in protected union activity.

(c) Interrogating its employees regarding their union sentiments and desires.

(d) Threatening its employees with loss of their jobs in the event of unionization.

(e) Confiscating the union literature of its employees.

(f) Prohibiting and interfering with its employees who are lawfully engaged in passing out handbills pertaining to the Union.

(g) Disciplining its employees with respect to their hire and tenure for lawfully passing out union handbills.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its files any reference to the unlawful discipline of Mark Layton and Robert Bolden and notify them in writing that this has been done and that the discipline will not be used against them in any way.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Post at its Coffeyville, Kansas plant copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''